BRIEF IN SUPPORT OF PETITION

I

The opinion of the District Court for the Southern District of Florida, record, page 16, is reported in 37 Fed. Supp., page 331.

The opinion of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, record, page 35, is reported in 125 Fed. 2nd, Page 897. (Adv. sheets.)

The petitioner's motion for rehearing is shown on record page 41.

The denial of such motion is shown on record page 44.

II

JURISDICTION

1. The date of the judgment to be reviewed is February 26, 1942.

2. This motion for rehearing was filed in the Circuit Court of Appeals on March 16, 1942.

3. The motion for rehearing was denied on the 24th day of March, 1942.

4. The Statutory provisions which it is believed sustains the jurisdiction of this Court appear in Vol. 28 U.S.C.A., Section 347.

5. This case involves the construction and application of the provisions of the Fair Labor Standards Act, 28 U.S.C.A., Section 201-219.

6. The cases believed to sustain said jurisdiction are:

Fed. Trade Commission vs. Bunte Bros., Inc., 312 U.S. 349, 85 Law Ed. 881.

Arsenal Bldg. Corp. vs. Fleming, 86 Law Ed. 729, Adv. sheets.

Fleming vs. Belo Corp., 86 Law Ed. 92, Adv. sheets.

III

STATEMENT OF CASE

This has already been stated in the record on appeal, paragraphs 4 to 15 inclusive, on pages 9-14, which is adopted and made a part of this brief.

IV

SPECIFICATIONS OF ERRORS

1. The Lower Court erred in holding that under the facts of this case the petitioner here engaged in interstate commerce, or in the production of goods for commerce, within the meaning and intent of the Fair Labor Standards Act.

2. The Lower Court erred in holding that Congress intended that the Fair Labor Standards Act

should apply to the business conducted by the petitioner.

3. The Lower Court erred in holding that Congress had the power to make said act applicable to the business of petitioner.

4. The Lower Court erred in refusing to hold that the purchasers of the product manufactured and sold by petitioner were the ultimate consumers within the meaning and intent of said act of Congress.

5. The Lower Court erred in holding that petitioner's boxes were shipped in commerce within the meaning and intent of the Fair Labor Standards Act.

V

QUESTIONS PRESENTED

Question One.

Did Congress in enacting the Fair Labor Standards Act intend to include within its provisions industries producing and selling their products intrastate when such sales were made in good faith and without intent to evade the provisions thereof. In other words, did Congress intend that the Fair Labor Standards Act apply to any and all industries whose activities *affect* interstate commerce, or are the provisions of said Act limited in their application to industries which are *themselves* engaged in commerce or in the production of goods for commerce.

FACTS

As shown by the statement of facts, the petitioner did not ship, deliver or sell any of its products in interstate commerce, but manufactured its boxes for, and sold them to local cigar factories, in good faith, in intrastate commerce. While under the decisions of this Court this fact alone would not exempt petitioner's activities from Federal regulation, if they had a substantial effect on commerce, it does raise the question of whether Congress in enacting the Fair Labor Standards Act intended to regulate such intrastate activities.

So far as known to counsel for petitioner this question has not been presented to this Court for determination, and there appears to be a conflict in the decisions of the different Circuit Courts of Appeals regarding same. The Circuit Court of Appeals for the Tenth Judicial Circuit in the case of *Jewell Tea Company vs. Williams,* 118 Fed. 2nd, 202-206, has held,

> "The act by its terms is limited to employees engaged in interstate commerce or the production of goods for interstate commerce. It does not extend to employment that merely affects interstate commerce. If there could be any doubt as to the correctness of the interpretation, it is set at rest by the legislative history of the Act."

While in the case at bar, the United States Circuit Court of Appeals for the Fifth Judicial Circuit, 125 Fed. 2nd, 897-899, states in its opinion,

> "It is sufficient to say that the validity of the exercise of the commerce power is to be determined by what is regulated, not by what the regulation affects, and Congress may, by appropriate legislation, regulate intrastate activities where they have a substantial effect on interstate commerce. By the express language employed in this section (15) (a)(1) Congress has made manifest its judgment that the regulation of such intrastate commerce is necessary to the effective regulation of interstate commerce. It would be practically impossible to regulate the interstate shipment without exercising control over the initial steps towards such transportation."

The Fair Labor Standards Act is national in scope and a final decision of this Court adjudicating the intention of Congress in enacting the Statute is necessary.

DISCUSSION

In determining the extent and application of Congressional enactments Courts are confined to the language of the Statute and the implications arising therefrom, but, as pointed out by this honorable court in the case of *Federal Trade Commission vs. Bunte Bros.*, 312 U.S. 349, 85 Law Ed. 881-883, where a similar question was presented:

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed the purpose explicitly. * * * * To be sure the construction of every such Statute brings a unique problem in which words derive vitality

> from the aim and nature of the specific legislation. But, bearing in mind that in ascertaining the scope of Congressional legislation a due regard for a proper adjustment of the local and national interest in our federal scheme must always be in the background, we ought not to find * * * * radiations beyond the obvious meaning of the language unless otherwise the purpose of the Act would be defeated."

Examining the several sections of the Fair Labor Standards Act in the light of the above decision, it will be observed that there are no words clearly indicating an intention to bring within its provisions activities *affecting* commerce, for as shown by Section 2, Congress only finds the existence of substandard labor conditions in industries *engaged in commerce* or in the *production of goods for commerce,* and again by Section 8 Congress declared the purpose of the Act was to reach the objective of 40c an hour in each industry *engaged in commerce* or in the *production of goods for commerce.*

It was because of this failure on the part of Congress to indicate that the Act was intended to cover industries engaged in producing goods *affecting* commerce, as well as the legislative history, and the decision of this Court in the *Bunte* case, supra, that led the Circuit Court of Appeals for the Tenth Circuit to hold that Congress did not intend that the terms of the Act should extend to intrastate activities.

In the case at bar, the Lower Court reached its conclusion that Congress intended to include in the coverage of the Act industries producing goods

affecting commerce because of the use of the words "sell with knowledge of intent" which appear in Section 15 (a) (1) of the Statute.

Counsel for petitioner believe that the Lower Court erred in so interpreting the phrase for the following reasons:

This court having held that Congress had the power under the commerce clause to regulate wages in industries engaged in commerce or in the production of goods for commerce, it necessarily follows that Congress had the further power of punishing criminally any such industry that violated the terms of the Act or attempted to evade the provisions thereof.

> *United States vs. Lewis Fox,* 95 U.S. 670, 24 Law Ed. 538.
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> *United States vs. Hall,* 98 U.S. 343, 25 Law Ed. 180-185.

However, Section 15 (a) (1) is a criminal statute, designed by Congress to prevent industries engaged in commerce, or in the production of goods for commerce, from using interstate commerce as a means of marketing the goods owned or produced by them unless they had paid the wage required by Sections 6 and 7. Being a criminal section the language used therein can not alter or enlarge the definition or description of the industries Congress intended to cover by the language used in the body of the Act.

An examination of Section 15 (a) (1) reveals that its sanctions are clearly divisible into two separate and distinct offenses, to-wit:

> (a) "to transport, offer for transportation, ship, deliver or sell in commerce," or
>
> (b) "ship, deliver or sell with knowledge that shipment, delivery or sale thereof in commerce is intended,"

any goods in the production of which any employee is employed in violation of Sections 6 and 7.

Bearing in mind that the word "person" as used in this section connotes "industries engaged in commerce" or in "the production of goods for commerce," and further examining (a) and (b) above in the light of the purposes for which Congress may impose sanctions, or penalties, we find that clause (a) is sufficiently clear, definite and certain to warn any industry engaged in commerce, or in the production of goods for commerce, that it would be liable to the criminal penalties of the Act if it ships any of the goods, owned or produced by it, in commerce when it has not paid the wage scale required by Sections 6 and 7. The alternative, or (b) clause, "to ship, deliver or sell with knowledge that shipment, or delivery or sale thereof in commerce is intended" as used in the Section is also sufficiently definite to warn *such* industries that they will be liable to the criminal penalties of the Act if they try to evade its provisions by conspiracy or subterfuge, such as selling goods intrastate with knowledge that shipment thereof in commerce is intended, for the crime would be the fradulent intent to evade the act and not the sale of its products intrastate.

On the other hand, to interpret the alternative provision in the section as making criminal the local sale in good faith of goods simply because the seller has knowledge of an intent on the part of the purchaser to ship the same in commerce, would make "knowledge of an intent" a crime regardless of whether the "intention" was ever carried out.

If we assume, as it undoubtedly frequently happens, that the purchaser abandons his intention to ship in commerce and sells locally or disposes of such merchandise by means other than interstate commerce, we would have the anomalous situation where no shipment in commerce was ever made, and yet, because the purchaser had that *intention* when he bought the merchandise, the manufacturer has become guilty of a crime. We can not believe that Congress intended the words to be so construed or, if so, that it had the power to make criminal an innocent act.

Let us carry this matter to another logical conclusion. We shall first read into Section 215 the words called for by the body of the Act, which we will insert in parenthesis, and we find the section reading as follows:

> "* * * * * it shall be unlawful for any person (engaged in commerce or in the production of goods for commerce) to transport, offer for transportation, ship, deliver, or sell in commerce * * * * any goods in the production of which any (of his) employee (s) was employed in violation of, etc."

If that be the proper construction of this section, and we believe that it is, then in a case like the instant one where goods are manufactured locally for local sales only, without proof or implication that the method used was a subterfuge to evade the Act, as the District Court found, and even though such manufacturer had knowledge that its customers intended to ship its product in commerce, it is clear that such customer, itself engaged in commerce, could safely transport such merchandise through the arteries of commerce just so long as the customers *own* employees were paid the wages, and observed the hours, provide by this Act. Can it then be said that the manufacturer is subject to punishment when the customer who actually placed such merchandise in commerce is guiltless of any crime? We believe not, and yet that is the effect of the ruling below.

Counsel for petitioner respectfully submit that the Lower Court erred in holding that Congress intended the provisions of the Fair Labor Standards Act to apply to the activities of the petitioner, and that petitioner violated the provisions of Section 15 (a) (1) in its local sales.

Question Two

Where by law cigar box containers can not be reused, refilled nor trafficked in, and are subject to destruction by Revenue Agents when emptied, will a shipment of cigars interstate by cigar factories, packed in such containers, be deemed to be a shipment in commerce of the *containers* within the meaning and intent of the Fair Labor Standards Act.

DECISION OF COURT

The Lower Court has held that the petitioner's knowledge that the boxes would be used to contain cigars shipped in commerce by its customers constituted "knowledge of intent to ship in commerce" within the meaning of Section 15 (a) (1), and, the petitioner not having complied with Sections 6 and 7 of the Act, it violated Section 15 (a) (1) and issued its injunction restraining all further violations.

Counsel for petitioner believe such holding to be error.

DISCUSSION

Under the above statement it is clearly apparent that the cigar boxes produced by petitioner never came into competition with similar boxes in the State of destination of the cigars, for their economic value as articles of commerce were destroyed at the local factories.

By Section 3 (i) of the Act the word "goods" as used in Section 15 (a) (1) and elsewhere in the act is defined as,

> "Goods" means goods (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

It is petitioner's contention that the cigar boxes not being a part or ingredient of the cigars, lost their identity as articles or subjects of commerce when filled by the local factories and were no longer "goods" within the meaning and intent of the Fair Labor Standards Act, for the cigar factories were the ultimate consumers.

Durr Drug Co. v. Long, 188 So. 873, 874.

McCarroll v. Scott Paper Co., 115 S.W. 2nd 839.

Wiseman v. Arkansas Wholesale Gro. Co., 90 S.W. 2nd 987.

Maller Co. Inc. v. Department of Finance, 25 N.W. 2nd 987.

Birmingham Paper Co. v. Curry, 190 So. 86.

J. R. Raible Co. v. State Tax Commission, 194 So. 560.

Counsel for petitioner respectfully submit that the Circuit Court of Appeals erred in holding that petitioner was subect to the terms of the Fair Labor Standards Act and had violated Section 15 (a) (1) thereof.

Respectfully submitted,

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